87-1971

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PATRICIA ANN GRIFFIN,
by and through her next friend and
natural father, LARRY D. GRIFFIN; and
LARRY D. GRIFFIN, individually,

Petitioners,

vs.

FORD MOTOR COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A CAUSE OF ACTION, HAVING ACCRUED TO THE PLAINTIFF UPON THE OCCURRENCE OF A TORT, IS PROPERTY WHICH MAY BE TAKEN BY THE STATE THROUGH THE RETROACTIVE APPLICATION OF A SUBSEQUENT CHANGE IN THE LAW

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 835 F.2d 1369. The opinion of the district court (Appendix B) is not reported.

JURISDICTION

The judgment of the court of appeals (Appendix C) was entered on January 22, 1988. The order of the court of appeals denying a timely petition for rehearing (Apppendix D) was entered on March 2, 1988. The jurisdiction of this Court is invoked under title 28, section 1254(1), United States Code (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States involved are the fifth amendment and the fourteenth amendment, the relevant parts of which provide:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Patricia Ann Griffin, by and through her next friend and natural father, Larry D. Griffin, and Larry D. Griffin, individually (collectively "Patricia Ann"), seek review by this Court of a judgment entered by the court of appeals. The judgment of which review is sought affirmed a final judgment entered by the district court, following a summary judgment for the defendant, Ford Motor Company ("Ford"), in a products-liability lawsuit. Jurisdiction of the district court arose under title 28, section 1332, United States Code (1982).

In 1974, the Florida Legislature enacted a twelve-year products-liability statute of repose.[1] In 1980, the Florida

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[1]"Actions for products liability . . . must be begun . . . within 12 years after the date of delivery of the completed product to its original purchaser . . .

Supreme Court held that the products-liability statute of repose could not be applied to bar the accrual of a cause of action when the injury occurred after the expiration of the twelve-year period prescribed by the statute of repose.[2] On January 23, 1985, Patricia Ann was

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regardless of the date the defect in the product . . . was or should have been discovered." Act of Jan. 1, 1975, ch. 74-382, §§ 3, 36, 1974 Fla. Laws 1207, 1208, 1222 (repealed 1986)(last codified at Fla. Stat. § 95.031(2)(1985)).

[2]Applying the principles explicated in Kluger v. White, 281 So. 2d 1 (Fla. 1973), and Overland Constr. Co. v. Sirmans, 369 So. 2d 572 (Fla. 1979), the Florida Supreme Court in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), held that where an injury occurred after the expiration of the twelve-year period prescribed by the statute of repose, the statute of repose had the effect of barring the cause of action before the cause of action accrued, thereby impermissibly benefitting one class of defendants at the expense of an injured party's right to sue, in violation of the Florida Constitution's guarantee of access to courts. See Battilla, 392 So. 2d at 874.

injured by a Ford product which was in excess of twelve years old.[3] On August 29, 1985, the Florida Supreme Court held that the products-liability statute of

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[3]Patricia Ann's complaint alleged as follows: On or about January 23, 1985, at about 6:30 P.M., seventeen-year-old Patricia Ann was loading paper into a tractor-trailer from an automobile designed and manufactured by Ford. Completing her task, Patricia Ann drove the Ford to a position in front of the tractor-trailer so that she could pick up some paper that had fallen to the ground. After placing the Ford in what appeared to her to be the "park" position, Patricia Ann left the engine running and got out of the Ford. At least one minute after getting out of the Ford, while picking up the fallen paper, Patricia Ann noticed a box beneath the tractor-trailer. As Patricia Ann reached down to retrieve the box, the Ford, without any warning, suddenly engaged powered reverse, moved abruptly backward, struck Patricia Ann, and pinned her head between the rear of the Ford and the tractor-trailer. As a result, Patricia Ann received severe, crushing and permanent injuries to her head, face and eyes. Although Ford had actual notice, years prior to Patricia Ann's accident, that Ford automatic transmissions were defectively designed and had caused hundreds of serious injuries and numerous deaths, Ford had willfully, wantonly and recklessly disregarded Patricia Ann's and other consumers' rights and

repose could be applied to bar the accrual of a cause of action although the injury occurred after the expiration of the twelve-year period prescribed by the statute of repose.[4]

Patricia Ann sued Ford on September 9, 1985. [R1--1--1] Following Ford's answer and a reply by Patricia Ann, Ford moved for summary judgment, premised on the Florida Supreme Court's reinterpretation of the statute of repose. [R1--4--1-8; R1--6--1-2; R3--35--1-4] In opposition to Ford's motion, Patricia Ann argued, among other things, that the Florida Supreme Court's reinterpretation of the law

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safety by failing to warn of the defect or recall the automobiles. [R1--1--1-13] Ford demonstrated by affidavit that the Ford was delivered to its original purchaser on or before October 27, 1971. [R3--35--4]

[4]Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), reh'g denied mem., 482 So. 2d 1352 (Fla. 1985), appeal dismissed mem., 475 U.S. 1114 (1986).

could not be applied retroactively by the district court to bar Patricia Ann's accrued cause of action, because Patricia Ann's accrued cause of action was a property interest, protected by the fifth and fourteenth amendments' due process clauses. [R3--39--1-9; R3--46--1-3; R3--47--1-8] Ford's motion was granted and final judgment was entered for Ford. [R3--43--1-5; R3--44--1; R3--49--1][5]

The court of appeals affirmed the judgment of the district court, holding that, although at the time Patricia Ann was injured the products-liability statute of repose, as interpreted by the Florida Supreme Court, could not be applied to a case such as Patricia Ann's, "the supreme

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[5] Patricia Ann's due-process argument was raised by a timely motion to alter or amend the district court's final judgment. [R3--46--1, 3; R3--47--1-2] See Fed. R. Civ. P. 59(e). The motion was summarily denied without opinion. [R3--49--1]

court was free to change its interpretation, and appellants had no vested right in a former interpretation."[6]

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[6]Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369, 1374 (11th Cir. 1988)[Appendix A].

ARGUMENT

AN ACCRUED CAUSE OF ACTION IS PROPERTY WHICH MAY NOT BE TAKEN BY THE STATE THROUGH THE RETROACTIVE APPLICATION OF A SUBSEQUENT CHANGE IN THE LAW

This Court has recently reaffirmed that an accrued cause of action is a property interest, protected by the due process clauses. See Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340, 1344-45 (1988). Nevertheless, the court of appeals held that the state may summarily deprive a plaintiff of her accrued cause of action without providing a hearing on the merits of the claim. The state may do this, the court of appeals held, by changing its interpretation of the law under which the cause of action accrued, and then retroactively applying the changed law to bar the cause of action. See Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369, 1374 (11th Cir. 1988) [Appendix A].

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930), this Court held that the requirement of due process extends to state action through its judicial as well as through its legislative branch of government, id. at 680, and that the state's judicial branch may not deprive a person of all existing remedies for the enforcement of a right, unless there is afforded some real opportunity to protect that right, id. at 682. This case, therefore, presents this Court with the opportunity to reaffirm and amplify its holding in Brinkerhoff-Faris Trust & Savings Co.

The Tragic Trap of Judicial Indifference

The tragic events which bring Patricia Ann to this Court had their origin in corporate greed, and have been perpetuated and compounded by judicial indifference. On January 23, 1985, Patricia Ann was forever

deprived of the opportunity to live a normal life. She was deprived in an instant, when a 1971 Ford automobile with a defectively-designed automatic transmission system, as had thousands of similar Fords before it, spontaneously shifted into powered reverse. She was deprived without warning, as the Ford struck with such speed and such force that Patricia Ann's head was crushed and pinned between the Ford and another vehicle.

At the time of Patricia Ann's injury, over ten years had passed since the enactment of Florida's products-liability statute of repose. See Act of Jan. 1, 1975, ch. 74-382, §§ 3, 36, 1974 Fla. Laws 1207, 1208, 1222. Yet, because of the Florida Supreme Court's interpretation of the products-liability statute of repose, the statute could not be applied

to bar a cause of action, such as Patricia Ann's, which had accrued after the running of the statute of repose. See Battilla v. Allis Chalmers Manufacturing Co., 392 So. 2d 874 (Fla. 1980). As applied to a situation such as Patricia Ann's, the products-liability statute of repose was, at the time of her injury, totally and unquestionably without effect. See id.

On August 29, 1985, the Florida Supreme Court summarily concluded, sua sponte, that the products-liability statute of repose could be applied to bar a cause of action before the cause of action accrued. See Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), reh'g denied mem., 482 So. 2d 1352 (Fla. 1985), appeal dismissed mem., 475 U.S. 1114 (1986).

On January 10, 1986, the district court retroactively applied the products-lia-

bility statute of repose, as reinterpreted in Pullum, to bar Patricia Ann's cause of action. See Griffin v. Ford Motor Co., No. TCA 85-7244-WS (N.D. Fla. Jan. 10, 1986), aff'd sub nom. Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir. 1988) [Appendix B]. The district court applied the products-liability statute of repose in a manner in which the statute of repose unquestionably could not have been applied at the time Patricia Ann's cause of action accrued. See Battilla, 392 So. 2d at 874.

At its next session following the Florida Supreme Court's decision in Pullum, the Florida Legislature completely repealed the products-liability statute of repose. See Act of July 1, 1986, ch. 86-272, §§ 2, 3, 1986 Fla. Laws 2019, 2020. The Florida Supreme Court thereafter held, however, that the legislative repeal

of the statute of repose could not be applied retroactively, see Melendez v. Dreis & Krump Manufacturing Co., 515 So. 2d 735 (Fla. 1987), and at the same time held that its reinterpretation in Pullum was to be applied retroactively, see Melendez, 515 So. 2d at 737. The Florida Supreme Court also held that retroactive application of Pullum was not a deprivation of due process. See Clausell v. Hobart Corp., 515 So. 2d 1275 (Fla. 1987).

Patricia Ann has, thus, been caught in a cruel tripartite trap, one which has ensnared other similarly-situated plaintiffs in Florida: (1) Patricia Ann was injured, but had not obtained a final adjudication or settlement on the merits of her accrued cause of action before the Pullum decision was issued; (2) a court applying Florida law has

applied Pullum retroactively, thus divesting Patricia Ann of her accrued cause of action; and (3) the Supreme Court of Florida has ruled that the complete repeal of the products-liability statute of repose may not be applied retroactively to revive the accrued and retroactively divested cause of action.

No constitutional provision could have protected Patricia Ann from the pain and suffering of that instant when she was struck by the Ford. But in Patricia Ann's instant of loss, she received a right which is constitutionally protected. The facts alleged in Patricia Ann's complaint, leading up to and encompassing the instant of crushing, permanent injury to her head, face and eyes, bestowed upon Patricia Ann an opportunity, her sole opportunity, see Bodie v. Connecticut, 401 U.S. 371, 374-77 (1971), to regain, in the only

way our society allows, that which Ford has taken from her.

In her instant of overwhelming loss, Patricia Ann was vested with a property interest. It was not property which came easily, nor was it property which one would choose to receive, given the cost of its acquisition. But it is now all that Patricia Ann has. It is a cause of action. And under the Constitution of the United States, Patricia Ann may not be deprived of that cause of action without due process of law. It is the indifference of those courts which have failed to uphold the precedent of this Court which now brings Patricia Ann to this Court, seeking the constitutional protection which has thus far been denied her.

The Protection of Due Process

Although, as the court of appeals stated, no one has a "vested right in a former interpretation" of the law, see Eddings, 535 F.2d at 1374 [Appendix A], that is not the issue involved in this case. In reaching its holding, the court of appeals overlooked the distinction between, on the one hand, a mere expectation that an abstract rule of law will continue unchanged and, on the other hand, an accrued cause of action. Once an injury has occurred and a cause of action has, therefore, accrued, the cause of action has, in essence, an existence of its own, independent of the underlying law which made possible its birth: the accrued cause of action is property, which may not be destroyed by the retroactive application of a subsequent change in the law.

Any attempt by the state to remove an accrued cause of action from its owner by denying a hearing on the merits of the cause of action, is a deprivation of a vested property interest and, thus, a deprivation of the owner's fundamental right to procedural due process. That is the conclusion of this Court in Brinkerhoff-Faris Trust & Savings Co. and in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and it was not competent for the court of appeals to recede, as in effect it has, from that fundamental constitutional principle.

The court of appeals reached its holding by relying upon New York Central Railroad v. White, 243 U.S. 188 (1917), Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), and Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.), cert. denied

mem., 439 U.S. 1002 (1978). The court of appeals's holding, however, is not supported by a careful reading of those cases. In both New York Central Railroad and Duke Power Co., this Court, addressing the preemption of common-law rights by a compulsory compensation scheme, confronted a change in the law which occurred prior to, not following, the accrual of a cause of action. See Duke Power Co., 438 U.S. at 87-92 & n.32; New York Central Railroad, 243 U.S. at 190, 196. In Ducharme, as well, the cause of action at issue was legislatively abrogated prior to the occurrence of a cause-of-action-accruing injury. See Ducharme, 574 F.2d at 1309-10.

As explained by the court of appeals in an earlier decision, Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971), cert. denied mem., 404 U.S. 1017 (1972),

> A person has no property,
> no vested interest,

> in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature . . . .
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> This principle was explicated by later cases. While conceding that one can have no vested interest in any rule of common law, these cases emphasized that a right created under such a rule which has been perfected could not be taken away without being violative of the Fifth and Fourteenth Amendments. Coombes v. Getz, 285 U.S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932). On the other hand, one cannot be heard to question the sufficiency of due process if the rule of law, which merely held the potential to create a property right, was changed before any right vested.

Keller, 441 F.2d at 1242 (emphasis added) (quoting Mondou v. New York, New Haven & Hartford Railroad, 223 U.S. 1, 50 (1912)).

This Court has stated unequivocally

that an accrued cause of action is a species of property, protected by the due process clauses. Logan, 455 U.S. at 428; accord Pritchard v. Norton, 106 U.S. 124, 132 (1882). An accrued cause of action is property through which a plaintiff is guaranteed, if not a particular remedy, then at minimum the preservation of the plaintiff's substantial right to redress through some effective procedure. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). Forced as he is, by right and duty, to settle his cause of action only through the judicial process, the plaintiff must be given a meaningful opportunity to be heard. Logan, 455 U.S. at 430 n.5.

> The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.
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> . . . .

> . . . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 680-82; accord Robinson v. Ariyoshi, 441 F. Supp. 559, 580 (D. Hawaii 1977).

In Brinkerhoff-Faris Trust & Savings Co., the plaintiff brought a suit in equity against the treasurer of Henry County, Missouri, for alleged discriminatory tax-valuation practices. As grounds for equity jurisdiction, the plaintiff alleged that no other remedy was available, either legal or administrative. The

defendant opposed equitable relief on the ground that certain administrative relief was available and had not been pursued, and that the plaintiff was, therefore, guilty of laches. The trial court dismissed the complaint without opinion or findings of fact.

The Missouri Supreme Court found that, although the administrative relief alleged by the defendant was not available, relief could have been had from the state tax commission at any time before the tax books were delivered to the collector. The Missouri Supreme Court held that the plaintiff, having failed timely to complain to the state tax commission, was guilty of laches, and affirmed the judgment of the trial court. Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 674-76.

Six years prior to the suit against

the county treasurer, the Missouri Supreme Court had been required, in another case, to determine whether the state tax commission had, by statute, the power to grant the relief sought against the county treasurer. On that occasion, the Missouri Supreme Court had concluded that it was "preposterous" and "unthinkable" that the state tax commission had such power, and that the statute, if so construed, would violate the Missouri Constitution.

No one doubted the authority of the earlier case until it was expressly overruled by the Missouri Supreme Court in Brinkerhoff-Faris Trust & Savings Co. The possibility of relief before the state tax commission was not suggested by anyone in the entire litigation until the Missouri Supreme Court filed its opinion. The plaintiff's motion for rehearing alleged that retroactive application

of the new construction of the statute violated the due process clause. The motion was denied without opinion. Id. at 676-78.

This Court stated, "We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law--using that term in its primary sense of an opportunity to be heard and to defend its substantive right," id. at 678, and, "It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense," id. This Court further stated, "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,--whether it has had an opportunity

to present its case and be heard in its support," id. at 681.

In Logan v. Zimmerman Brush Co., the claimant filed a charge with the Illinois Fair Employment Practices Commission, as required by law, within 180 days of an alleged discriminatory act. Contrary to the law, however, the Commission failed to schedule a settlement conference within 120 days. The Illinois Supreme Court held that this divested the Commission of jurisdiction to consider the claimant's charge. The Illinois Supreme Court rejected the claimant's argument that his due process rights would be violated were the Commission's error allowed to extinguish his cause of action. Logan, 455 U.S. at 424-27.

This Court, noting that the "words of the Due Process Clause . . . at a minimum . . . require that deprivation

of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," Logan, 455 U.S. at 428 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)), stated that a two-part inquiry must be undertaken: (1) whether the claimant was deprived of a protected interest; and (2), if so, what process was due him, Logan, 455 U.S. at 428. This Court began its inquiry by concluding that the first question was affirmatively settled in Mullane, where this Court held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," Logan, 455 U.S. at 428.

In Mullane, the beneficiaries of certain trusts had been deprived of property when their "rights to have the trustee

answer for negligent or illegal impairment of their interest" had been cut off. Logan, 455 U.S. at 428-29 (quoting Mullane, 339 U.S. at 313). There was no meaningful distinction between the cause of action at issue in Mullane and the cause of action at issue in Logan. Logan, 455 U.S. at 429. "This conclusion," this Court stated, "is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Id.

In its more recent cases, this Court has found the hallmark of property to be "an individual entitlement grounded in state law, which cannot be removed except 'for cause.' . . . Once that characteristic is found, the types of interests

protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" Id. at 430. The claimant in Logan, therefore, had more than an abstract desire or interest in redressing his grievance. His right to redress was guaranteed by the state, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence. Id. at 431.

As to the process due, this Court's decisions

> have emphasized time and again [that] the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Id. at 433-34 (emphasis added).

The party is entitled to have the merits of his claim considered, based upon the substantiality of the available evidence. See id. at 434. Although the state may erect reasonable procedural requirements for triggering the right to an adjudication, including statutes of limitations, due process requires an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. Id. at 437.

It is such an opportunity that Patricia Ann, like the claimant in Logan, has been denied. See id.; accord Gibbes, 290 U.S. at 332 (although a plaintiff with a vested cause of action has no property interest in any particular form of remedy, the due process clause guarantees him the preservation of his substantial right to redress by some effective procedure);

Coombs, 285 U.S. at 448 (the right to enforce a contractual obligation, having become vested, was within the protection of the due process clause); Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway, 151 U.S. 1, 19 (1894)("A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."); Pritchard, 106 U.S. at 132 ("[A] vested right of action is property in the same sense in which tangible things are property . . . . Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature

to take it away.").[7]

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[7]Several other courts also have reached the conclusion that an accrued cause of action is property, of which the plaintiff may not be deprived by application of a subsequent change in the law without violating the plaintiff's right to procedural due process. See Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367-68 (6th Cir. 1984) ("In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs."); Mathis v. Eli Lilly & Co., 719 F.2d 134, 138 (6th Cir. 1983) (same); Pitts v. Unarco Indus., 712 F.2d 276, 279 (7th Cir.) ("An accrued cause of action [in tort] is a right of property protected by the Fourteenth Amendment; an unaccrued cause of action is not;" citing Logan), cert. denied mem., 464 U.S. 1003 (1983); Greyhound Food Management, Inc. v. City of Dayton, 653 F. Supp. 1207, 1216 (S.D. Ohio 1986)("Upon the occurrence of an injury, a person acquires a vested right (i.e., a property right protected by the due process clause of the fourteenth amendment) in those causes of action arising out of the injury under the state law applicable at the time."); Harlow v. Ryland, 78 F. Supp. 488, 491 (E.D. Ark. 1948)(a right of action for a tort which may happen in the future is not property), aff'd, 172 F.2d 784 (8th Cir. 1949); Cheswold Volunteer Fire Co. v. Lambetson Constr. Co., 489 A.2d 413, 418 (Del. 1985)("[D]ue process preserves a right of action [in tort] which has accrued or vested before the effective

At the time Patricia Ann was injured, her cause of action accrued under the law as it then existed. This is true notwithstanding the Florida Supreme Court's subsequent reinterpretation of the statute of repose. Patricia Ann's accrued cause of action is property, which may not be taken by the retroactive application of a subsequent change in the law. By denying Patricia Ann a hearing on the

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date of the statute."); Rupp v. Bryant, 417 So. 2d 658, 666 (Fla. 1982)(a subsequent change in the law may not be applied retroactively to abolish a vested right of recovery); Marcel v. La. State Dep't of Pub. Health (Dep't of Health & Human Resources), 492 So. 2d 103, 109-10 (La. Ct. App.) ("Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right."), cert. denied mem., 494 So. 2d 334 (La. 1986); Reeves v. Ille Elec. Co., 170 Mont. 104, 110, 551 P.2d 647, 650 (1976)("Where an injury has already occurred for which the injured person has a right of action, the Legislature cannot deny him a remedy."); Rosenberg v. Town of N. Bergen, 61 N.J. 190, 199-200,

merits of her cause of action, by retroactively applying the reinterpreted statute of repose, the district court deprived Patricia Ann of a property interest and, thus, of her fundamental right to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

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293 A.2d 662, 667 (1972)("The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed."); Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985)("[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.").

CONCLUSION

As this Court has stated, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. 137, 163 (1803). Patricia Ann respectfully requests that this Court grant her petition for a writ of certiorari.

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APPENDIXES

Appendix A
Opinion of the United
State Court of Appeals
for the Eleventh Circuit

Philip H. EDDINGS, as Personal Representative of the Estate of Scott Philip Eddings, Deceased, on Behalf of Philip H. EDDINGS, and Virginia Rae Randt, individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK, A.G., a/k/a Volkswagen Aktiengesellschaft, a foreign corporation, et al., Defendants-Appellees.

Patricia Ann GRIFFIN, By and Through her next friend and natural father, Larry D. GRIFFIN, and Larry D. GRIFFIN, individually, Plaintiffs-Appellants.

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

Albert V. VERHINE, Jr., a minor, By A. Brennis VERHINE, his legal Guardian; and A. Brennis Verhine, and Glenda L. Verhine, his natural parents, Individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK, A.G., a foreign corporation and Volkswagen of America, Inc., a foreign corporation, Defendants-Appellees.

Dana C. LAMB, a minor, By and Through his mother and next friend, Jeanne F. DONALDSON, Jeanne F. Donaldson, individually, Plaintiffs-Appellants,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, Volkswagen of America, Inc., a New Jersey corporation, Defendants-Appellees.

Nos. 86-3068, 86-3103, 86-3138 and 86-5258

United States Court of Appeals, Eleventh Circuit.

Jan. 22, 1988.

Actions were brought against automobile manufacturers for injuries suffered more than 12 years after date of delivery of automobiles to original purchasers, and defendants moved for summary judgment. The United States District Court for the Northern District of Florida, No. PCA 83-4127-WEA, 635 F.Supp. 45, Winston E. Arnow, J., entered summary judgment for defendants, as did the United States District Court for the Nothern District of Flcrida, Nos. TCA 85-7244-09 and 84-71 20-WS, William Stafford, Chief Judge, and the United States District Court for the Southern District of Florida,

631 F.Supp. 1144, Stanley Marcus, J., and plaintiffs appealed. On consolidated diversity actions, the Court of Appeals, Tjoflat, Circuit Judge, held that plaintiffs did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding 12-year statute of repose unconstitutional, such that application of statute of repose after Florida Supreme Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process.

Affirmed.

1. **Constitutional Law 308**

Limitation of Actions 4(2)

Florida's statute of repose which barred actions for products liability brought more than 12 years after date

of delivery of completed product to original purchaser did not violate Fourteenth Amendment due process clause; recognizing overruling of Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla.). U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

2. **Constitutional Law 308**

Limitation of Actions 31

Plaintiffs who brought actions against automobile manufacturers for injuries suffered more than 12 years after date of initial purchase of automobiles did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding Florida statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to its original purchaser unconstitutional, such that application of statute of repose after Florida Supreme

Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process. U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

3. **Constitutional Law 249(3)**

Limitation of Actions 4(2)

Florida statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to its original purchaser did not violate Fourteenth Amendment equal protection clause on theory that the statute of repose, combined with four-year statute of limitations, created two classes of injured persons with different legal rights--one class including persons who were injured less than eight years after delivery of product to original purchaser, who had full four

years afforded by statute of limitations to bring actions, and another class including persons who were injured more than eight years, but less than 12 years, after product was delivered to original purchaser, who therefore had less than full four years afforded by statute of limitations to file suit--with no rational basis for the disparate treatment. U.S.C.A. Const. Amend. 14; West's F.S.A. § 95.031(2).

Karen E. Roselli, Kevin A. Malone, Fort Lauderdale, Fla., for plaintiffs-appellants in 86-3068.

Cathy Jackson Lerman, Fort Lauderdale, Fla., for amicus curiae Academy of Florida Trial Lawyers.

J. Richard Caldwell, Jr., Sharon Lee Stedman, Orlando, Fla., for defendants-appellees in 86-3068.

Edward T. O'Donnell, Mershon, Sawyer,

Johnston, Dunwody & Cole, Miami, Fla., for amicus curiae Motor Vehicle & Product Liability.

Robert K. High, Jr., E.C. Deeno Kitchen, Brian S. Duffy, Robert M. Ervin, Jr., Tallahassee, Fla., Allen W. Lindsay, Jr., Milton, Fla., for plaintiffs-appellants in 86-3103.

Patrick J. Farrell, Jr., Patricia Guilday, Tallahassee, Fla., John M. Thomas, Office of the General Counsel, Ford Motor Co., Dearborn, Mich., for defendant-appellee in 86-3103.

John Stephen Derr, Field, Granger, Santry & Mitchell, Tallahassee, Fla., Michael Hoenig, Herzfeld & Rubin, New York City, for plaintiffs-appellants in 86-3138.

Sharon Lee Stedman, Rumberger, Kirk, Caldwell, Cabaniss & Burke, Orlando, Fla., for defendants-appellees in 86-3138.

Charles R. Stack, High, Stack, Lazenby & Palahach, Coral Gables, Fla., for plaintiffs-appellants.

Wendy F. Lumish, Rumberger, Wechsler & Kirk, Miami, Fla., Sharon Lee Stedman, Miami, Fla., for defendants-appellees in 86-5258.

Appeals from the United States District Court for the Northern District of Florida.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge.

TJOFLAT, Circuit Judge:

These four consolidated diversity actions present two issues involving Florida's products liability statute of repose. The first issue concerns

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*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

the effect of a decision by the Florida Supreme Court in which the court reversed a prior decision holding that the statute of repose was invalid as applied. We must decide whether application of the supreme court's later decision in the cases before us deprives the appellants of a vested property right, in violation of the fourteenth amendment's due process clause. The second issue involves the question of whether Florida's statute of repose creates two classes of persons with different legal rights, in violation of the fourteenth amendment's equal protection clause. In each of the four cases, the district court granted the appellee's motion for summary judgment. 635 F.Supp. 45, 631 F.Supp. 1144. We affirm.

I.

A.

In 1974, the Florida legislature enacted a twelve-year products liability statute of repose.[1] That statute terminated manufacturer liability with respect to suits brought more than twelve years after delivery of the product to its

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[1] The statute of repose, Fla.Stat. § 95.031(2) (1982), provided as follows:

> Actions for products liability. . . must be begun within the period prescribed in this chapter . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

In 1986, the Florida legislature amended section 95.031(2) so as to repeal the statute of repose in products liability actions. See Fla. Stat. § 95.031(2) (Supp. 1987). The Florida Supreme Court has held that this repeal has no effect on cases arising prior to the date of the amendment. See Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735, 737 (Fla. 1987).

first purchaser. In other words, the Florida legislature determined that independent of whether the applicable statute of limitations had run, an injury caused by a product that had been delivered to its original purchaser more than twelve years prior to the filing of the plaintiff's lawsuit would give rise to no cause of action against the manufacturer or designer.[2]

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[2] A statute of repose is to be distinguished from a statute of limitations. The district court in one of the cases before us thoughtfully explained the difference between a statute of repose and a statute of limitations:

> While in the most general sense statutes of repose and statutes of time limitations are similar in that they prescribe the periods within which actions may be brought, we think there are critical analytical distinctions between the two and we do not use the terms interchangeably here. A statute of repose terminates the right to bring an action after the lapse of a specified period. The right to bring the action is foreclosed when the event giving rise to the cause of action does

In December 1980, in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) (per curiam), the Florida Supreme Court

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> not transpire within this interval. A statute of limitations delineates the time a party has to initiate an action once the injury has occurred; it does not begin to run until the wrong has been or should have been discovered. Simply stated, a statute of repose is triggered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has elapsed the victim is without recourse to the manufacturer of the product. A statute of repose ". . . does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising."
>
> Rosenberg v. Tower [sic] of North Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972). Thus under the Florida statute of repose an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action. "The injured party literally has no cause of action. The harm that has been done is damnum absque injuria--a wrong for which the law affords no redress." Id. The effect of the

held that the twelve-year statute of repose, as it applied to a plaintiff whose injury occurred more than twelve years after delivery of the product to its first purchaser, worked a denial of access to courts in violation of the Florida Constitution.[3] In August 1985, the Florida Supreme Court, in Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla.1985), overruled Battilla and held

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> statute of repose may be to bar the cause of action before it has accrued. These product liabilty statutes of repose are designed and intended to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a state claim, and ultimately foster certainty and finality in liability.

Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144, 1147 (S.D.Fla.1986).

[3] Article I, section 21 of the Florida Constitution provides as follows:

> § 21 Access to courts
>
> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

that the statute of repose is "not unconstitutionally violative of [the right of access] of the Florida Constitution." Although the supreme court did not state in Pullum whether the rule announced in that case would apply to cases involving injuries occurring after the Battilla decision but before the Pullum decision, it has since held that Pullum does apply to such cases. See Pait v. Ford Motor Co., 515 So.2d 1278, 1279 (Fla. 1987); Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735, 737 (Fla. 1987).

B.

Each of the present lawsuits arose out of an accident occurring in Florida and involving an automobile that had been delivered to the original purchaser more

than twelve years before the accident.[4]

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[4] The chronology of relevant dates for each of the four cases is summarized below:

Eddings v. Volkswagenwerk, A.G., No. 86-3068
1967--Car delivered to original purchaser
1979--Statute of repose expires
1980--Battilla decided
1982--Accident occurs
1983--Suit filed
1985--Pullum decided

Lamb v. Volkswagenwerk Aktiengesellschaft, No. 86-5258
1967(Nov. 13)--Car delivered to original purchaser
1979(Nov. 13)--Statute of repose expires
1979(Nov. 21)--Accident occurs
1980--Battilla decided
1982--Suit Filed
1985--Pullum decided

Verhine v. Volkswagenwerk, A.G., No. 86-3138
1969(July)--Car delivered to original purchaser
1980--Battilla decided
1981(July)--Statute of repose expires
1981(Aug.)--Accident occurs
1984--Suit filed
1985--Pullum decided

Griffin v. Ford Motor Co., No. 86-3103
1971--Car delivered to original purchaser
1980--Battilla decided
1983--Statute of repose expires
1985(Jan.)--Accident occurs
1985(Aug.)--Pullum decided
1985(Sept.)--Suit filed

In three of the cases, the accident occurred after the supreme court's decision in Battilla; in the fourth case, the accident occurred before Battilla was decided. All of the accidents occurred before the supreme court reversed itself in Pullum. In each case, someone injured in the accident, or a representative of his estate, filed suit in the district court against the manufacturer of the automobile, invoking jurisdiction under 28 U.S.C. § 1332 (1982).[5] In three of the cases, suit was filed after the supreme court decided Battilla but before it decided Pullum. In the fourth case, suit was filed eleven days after the

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[5]Section 1332 provides as follows:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests [sic] and costs, and is between-
(1) citizens of different states [sic];
. . . .

supreme court decided Pullum.

In each of the four cases, the defendant manufacturer moved the court for summary judgment, contending that because the twelve-year statute of repose had run its course, the plaintiff had no cause of action. In each case, the district court granted the defendant's motion for summary judgment. The plaintiffs have appealed to this court.

II.

The district court correctly interpreted Florida law in holding that the decision in Pullum controls these cases and leaves appellants with no cause of action rooted in products liability.[6] Appellants argue,

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[6] At the time the district court decided these cases, the Florida Supreme Court had not expressly decided whether Pullum would apply so as to bar a cause of action arising from an injury occurring after the Battilla decision but before the Pullum decision. The supreme court has,

however, that application of the statute of repose to their suits would, as a matter of federal law, deprive them of a vested property right in violation of the fourteenth amendment's due process clause.

[1] We note preliminarily that appellants' facial attack on the constitutionality of the Florida statute of repose is without merit. The United States Supreme Court, in cases raising the constitutionality of similar statutes, has found no violation of the fourteenth

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however, since ruled that Pullum is to have such application. See Pait v. Ford Motor Co., 515 So.2d 1278, 1279 (Fla.1987); Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735, 737 (Fla.1987).

In their briefs, appellants have in various degrees relied on Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Chevron involved the retroactive application of a federal court decision regarding a matter of federal statutory law and is not applicable to our analysis in this case.

amendment. See, e.g., Woodward v. Burnham City Hosp., 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980), dismissing appeal from Anderson v. Wagner, 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560 (1979) (no due process violation from legislative action "establishing the four-year outer limit within which to file a complaint for medical malpractice")(appeal dismissed for want of a substantial federal question; see 49 U.S.L.W. 3065 for summary of questions presented on appeal); Ellerbe v. Otis Elevator Co., 459 U.S. 802, 103 S.Ct. 24, 74 L.Ed.2d 39 (1982), dismissing appeal from 618 S.W.2d 870 (Tex.Civ.App. 1981) (due process of law not denied plaintiff by virtue of statute prohibiting suits against licensed engineers or architects for damages arising out of unsafe condition of real property that was improved more than ten years earlier)(appeal dismissed

for want of a substantial federal question; see 51 U.S.L.W. 3146 for summary of questions presented on appeal).[7]

[2] Appellants argue in the alternative that the statute of repose is unconstitutional as applied. Their argument, reduced to its essentials, is as follows. They begin with the premise that a products liability cause of action accrues at

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[7] Summary disposition by the Supreme Court of an appeal for want of a substantial federal question is a disposition on the merits of the case:

> As Mr. Justice Brennan once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ," Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice, 197 (4th ed. 1969) ("The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question. . . ."); C. Wright, Law of Federal Courts 495 (2d ed. 1970) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial

the time the injury occurs. Appellants' injuries occurred after the Florida Supreme Court decided Battilla but before it decided Pullum. Since their injuries therefore occurred at a time when Florida decisional law held that application of the statute of repose to cases such as theirs would violate the Florida Constitution, appellants reason that nothing in Florida law prevented the accrual of their causes of action at that time. Appellants argue that an accrued cause of action is a vested property right, and that application of the statute of repose now would deprive them of that right in violation of the due process

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federal question, is a disposition on the merits.").

Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

clause.[8]

We reject appellants' arguments that the Pullum decision should be analyzed as if it were a legislative reenactment of a repealed statute. Battilla did not invalidate the statute of repose; during the interim between the Battilla and the Pullum decisions, the statute continued to bar causes of action in cases factually distinguishable from Battilla. Appellants therefore cannot assert that the statute was repealed at the time their injuries occurred. Although at that time the supreme court had held that application of the statute to cases such as theirs violated the Florida Constitution, the supreme court

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[8] In one of the cases, Lamb v. Volkswagenwerk, A.G., No. 86-5258, the accident occurred before Battilla was decided. The appellant in Lamb therefore cannot make this particular argument.

was free to change its interpretation, and appellants had no vested right in the former interpretation. See New York Cent. R.R. v. White, 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."); see also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978)("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'"); Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307, 1309 (5th Cir.)("[A] plaintiff has no vested right in any tort claim for damages under state law."), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d

677 (1978).[9]

Appellants also apparently contend that their property rights are implicated because they relied on the Battilla decision when they filed their lawsuts. Underlying this argument is the notion that persons subject themselves to tortious conduct in reliance on a particular state of tort law. The timing of appellants' accidents, however, was of course purely

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9 Even if each appellant did possess an accrued cause of action, it would be questionable whether an accrued cause of action necessarily translates into a vested property right protected under the due process clause. See Hammond v. United States, 786 F.2d 8, 12 (1st Cir.1986)(reviewing Supreme Court precedent and concluding that "rights in tort do not vest until there is a final, unreviewable judgment").

We note that the Florida Supreme Court has decided that application of the statute of repose to persons in the appellants' position does not impair any vested rights cognizable under state law. See Brackenridge v. Ametek, Inc., 517 So.2d 667, 12 Fla. Law Weekly 589, 590(Fla. 1987).

fortuitous. We therefore conclude that appellants' due process challenge must fail.

III.

[3] Appellants in two of the cases before us argue that Florida's statute of repose violates the equal protection clause of the fourteenth amendment.[10] Appellants contend that the operation of the twelve-year statute of repose, Fla.Stat §95.031(2) (1982), together with the four-year statute of limitations, Fla. Stat. § 95.11(3)(e) (1982), creates two classes of injured persons with different legal rights. The first class includes those persons who are injured less than eight years after delivery of the product

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[10]Appellants in one of the two cases, Verhine v. Volkswagenwerk, A.G., No. 86-3138, concede in their reply brief that their case does not present an equal protection challenge.

to its first purchaser and who therefore have the full four years afforded by the statute of limitations to bring their actions. The second class includes those persons who are injured more than eight years but less than twelve years after the product is delivered to its first purchaser. Owing to the operation of the twelve-year statute of repose, persons in the second class have less than the full four years afforded those in the first class to file suit. Appellants argue that the statute of repose violates the equal protection clause of the fourteenth amendment because there is no rational basis for this disparate treatment.

The Florida Supreme Court rejected this equal protection argument in Pullum, 476 So.2d at 660. The plaintiff in Pullum appealed that decision to the United States Supreme Court. The Supreme Court

dismissed the appeal for want of a substantial federal question. Pullum v. Cincinnati, Inc., 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) (see 54 U.S.L.W. 3654 for summary of questions presented on appeal). The Court therefore disposed of Pullum on the merits, rejecting the equal protection arguments raised in that case.[11] We are bound by the Supreme Court's disposition of Pullum and accordingly reject appellants' contention that Florida's statute of repose violates the fourteenth amendment's equal protection clause.

IV.

For the foregoing reasons, the district court's grant of summary judgment in each of these four consolidated cases is

AFFIRMED.

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[11] See supra note 7.

Appendix B
Order of the United States
District Court for the
Northern District of Florida

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PATRICIA ANN GRIFFIN, by
and through her next friend
and natural father, LARRY D.
GRIFFIN, and LARRY D. GRIFFIN,
individually,

Plaintiffs,

TCA 85-7244-WS

v.

ORDER

FORD MOTOR COMPANY,
a foreign corporation,

Defendant.

Before the court is defendant's motion for summary judgment (document 35) and plaintiff's reply (document 39). After a review of the memoranda and the relevant case law, it appears the motion should be granted.

Defendant seeks summary judgment on the ground that plaintiffs' complaint is barred by the statute of limitations, Florida Statute § 95.031(2). There is no dispute as to the material facts of

the case. Defendant sold and delivered the automobile to its original purchaser on October 29 [sic], 1971. Plaintiff, who was injured on January 23, 1985, filed suit on September 9, 1985. Under Florida law, an action for product liability must be instituted within twelve (12) years of the date of delivery of the product to its original purchaser. The Florida Supreme Court declared that this statute is constitutional on August 29, 1985, in Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985).

Plaintiffs raise several arguments in defense of this motion. Plaintiffs first argue that the Pullum decision should not be applied retroactively. In order to advance that argument, plaintiffs first must establish some "retroactivity." That is, they must establish that they filed their case before Pullum was decided. To accomplish this feat, plaintiffs argue

that a decision is not final until the mandate issues, and, therefore, the Pullum decision of August 29 is not effective or binding until November 19, that is, until fifteen days after the denial of the motion for rehearing. To be sure, the mandate did not issue in Pullum until November 19, 1985. But plaintiffs have cited no case, and this court has found no case, which holds that a decision of the Florida Supreme Court is not binding precedent for the courts of this state until after the mandate has issued. Florida Rule of Appellate Procedure 9.340(a) itself contemplates that a mandate is not always required for final adjudication of a case. See, 3 Fla. Jur. 2d § 395. Thus it is clear that plaintiffs retroactivity argument must fail by definition. Accordingly, the court need not consider the application of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

Plaintiffs second argument is that they have a valid cause of action premised on defendant's post-sale duty to warn or or [sic] recall. Plaintiffs apparently attempted to break down the cause of action for negligence to its constituent parts and to allege a continuing breach of duty. However, products liability, being a term of art, includes negligence of which the duty to warn is one aspect. Section 95.031(2) applies to products liability which is in turn defined in Section 95.11(3)(e) as an action for injury to a person "founded on the design, manufacture, distribution, or sale of personal property." The term "products liability" is all encompassing, and the twelve-year statute of repose applies to bar plaintiffs' cause of action founded on the negligent failure to warn.

Plaintiffs finally argue that permitting plaintiffs injured by new products to

proceed with suits while barring plaintiffs injured by old products from courts violates the equal protection clause of the fourteenth amendment. Plaintiffs cite Handley v. Schweiker, 697 F.2d 999 (11th Cir. 1983) as an analogous case which holds that states may not erect an insurmountable barrier to proving paternity. The Handley case is not analogous. It involves the suspect class or quasi-suspect class of illegitimates for which a higher standard of scrutiny is used when testing a statute's constitutionality. Lalli v. Lalli, 439 U.S. 259 (1978). Furthermore, access to the courts to seek redress for personal injuries in a civil suit is not a fundamental right. United States v. Kras, 409 U.S. 434 (1973); cf. Boddie v. Connecticut, 401 U.S. 371 (1971). Therefore, in determining whether the statute at bar is constitutional, this court must first presume the constitutionality of the statute and decide

whether the statute is rationally related to a legitimate state instrest [sic]. City of New Orleans v. Dukes, 427 U.S. 297 (1976); Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980). The Florida Supreme Court, of course, has already found that the statute bears "a rational relationship to a proper state objective." Pullum at 660. This court likewise finds a legitimate state interest in limiting the liability of manufacturers and distributors of products to some definite period of time. Furthermore the division of consumers into classes of those injured by old and new products reasonable and rationally related to the state purpose. See. Annot., 25 ALR 4th 641, 644 (1983) (representative reasons for adopting time limits in products liability cases).

This court has pointed out before that this is not the proper forum for

debating the wisdom of the statute or the Florida Supreme Court's decision. Nor is this court the proper entity to draft better legislation. Dague at 25. Having applied the pertinent constitutional tests, this court concludes that the statute does not violate the equal protection clause of the Constitution.

Accordingly it is ORDERED:

1. Pursuant to Federal Rule of Civil Procedure 56, defendant is entitled to judgment as a matter of law.

2. The clerk shall enter judgment in favor of defendant and award defendant's costs. This case is hereby dismissed.

DONE and ORDERED this 10th day of January, 1986.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

Appendix C
Judgment of the United States
Court of Appeals
for the Eleventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3068

D.C. Docket No. 83-4127

PHILLIP H. EDDINGS,
as Personal Representative
of the Estate of Scott
Philip Eddings, Deceased,
on behalf of PHILLIP H.
EDDINGS, and VIRGINIA RAE
RANDT, individually,

Plaintiff-Appellant,

versus

VOLKSWAGENWERK, A.G.,
a/k/a VOLKSWAGEN
AKTIEGESELLSCHAFT [sic],
a foreign corporation,
et al.,

Defendants-Appellees.

No. 86-3103

D.C. Docket No. 85-7244-09

PATRICIA ANN GRIFFIN, by
and through her next friend
and natural father, LARRY
D. GRIFFIN, and LARRY D.
GRIFFIN, individually,

Plaintiffs-Appellants,

versus

FORD MOTOR COMPANY,

Defendant-Appellee.

No. 86-3138

D.C. Docket No. 84-7120

ALBERT V. VERHINE, JR.,
a minor, by A. BRENNIS
VERHINE, his legal Guardian;
and A. BRENNIS VERHINE, and
GLENDA L. VERHINE, his
natural parents, Individually,

Plaintiffs-Appellants,

versus

VOLKSWAGENWERK, A.G., a
foreign corporation and
VOLKSWAGEN OF AMERICA, INC.,
a foreign corporation,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Florida

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No. 86-5258

D.C. Docket No. 82-1692

DANA C. LAMB, a minor,
by and through his mother
and next friend, JEANNE
F. DONALDSON, JEANNE F.
DONALDSON, Individually,

Plaintiffs-Appellants,

versus

VOLKSWAGENWERK
AKTIENGELSELLSCHAFT, a
German Corporation,
VOLKSWAGEN OF AMERICA,
INC., a New Jersey
corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT and HILL, Circuit Judges,
and LYNNE*, Senior District Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Courts for the Northern and Southern Districts of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Courts in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Seybourn H. Lynn, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: January 22, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: FEB 17 1987 (AS TO 86-3068 & 86-3138)

ISSUED AS MANDATE: FEB 24 1988 (AS TO 86-5258)

ISSUED AS MANDATE: MAR 14 1988 (AS TO 86-3103)

Appendix D
Order of the United States
Court of Appeals for
the Eleventh Circuit
Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-3103

PATRICIA ANN GRIFFIN, by
and through her next
friend and natural father,
LARRY D. GRIFFIN, and
LARRY D. GRIFFIN,
individually,

Plaintiffs-Appellants,

versus

FORD MOTOR COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion January 22, 1988, 11 Cir., 198__, ____F.2d____).

(MARCH 2, 1988)

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

ORD-42

*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.